

Brownfields Study Group Lender Subgroup Meeting, June 28, 2016

Attendees:

Christopher H. Valcheff, True North Consultants, Inc.
Adam Gallagher, Dane County Treasurer
Jan Sheinson, BMO Harris Bank, NA
Mark A. Miller, Investors Community Bank
David Ruetz, GZA Environmental
Mark Thimke, Foley & Lardner, LLP
Jennifer Drury Buzacky, Whyte Hirschboeck Dudek S.C.
Michael Prager, DNR
Darsi Foss, DNR
Christine Haag, DNR
Jessica Kramer, DNR
Jon Turke, Wisconsin Bankers Association
Heather MacKinnon, Wisconsin Bankers Association

Minutes:

Meeting participants introduced themselves. Jennifer Buzacky welcomed attendees and described the update that had been delivered to the Brownfields Study Group (BSG) regarding the Subgroup's discussions at the BSG's last meeting in May.

Mark Thimke stated that the purpose of this meeting was to follow up on the last meeting's efforts to review the liability exemption to the state spills law for lenders to determine whether the exemption remains relevant and feasible in light of changes to lending practices that may have occurred in the twenty years since the law's enactment. He stated that the explicit language of state rules and legislation were important after the passage of Act 21 in 2011. Lenders must achieve all of the law's requirements to attain an exemption.

Jennifer Buzacky stated that the Subgroup would go through each section of Wis. Stat. Ch. 292.21 and also look at the statute as a whole in order to provide a forum for lenders and other stakeholders to discuss and provide input on the relevance of the law and feasibility of achieving the exemption. The BSG could then consider whether to pursue any issues and whether statutory or guidance changes were appropriate.

Mark Thimke stated that the Subgroup would start with reviewing the acquisition exemption (Wis. Stat. § 292.21 (1)(c)) at this meeting. He stated that Wis. Stat. § 292.11 (3) establishes liability for possession or control of hazardous substances. The acquisition exemption applies to "title to, or possession or control of" real property by a lender through enforcement of a security interest.

Mr. Thimke discussed the first few subsections of Wis. Stat. § 292.21 (1)(c), stating that he had not heard of issues arising under these subsections. He asked what issues there might be with the spill notice that is required under the exemption. Darsi Foss stated that it would be difficult to know numbers for items not reported to DNR. Mark Thimke asked the attendees whether there might be

issues with the notice requirement. Lenders in attendance stated that in their experience, any problems spotted were proactively dealt with, at the time of lending and also at the time of collection.

Darsi Foss stated that there had been past instances when lenders were confused by the language regarding “possession or control” of real property. Attendees discussed the language and reasons for potential confusion. Jennifer Buzecky stated that a positive aspect of this language may be that the exemption provides broad coverage. DNR had concerns that this might not be clear – e.g., situations where a lender never acquired title to property, but allowed access to the property, leasing of property, etc.

Lenders in attendance asked whether the lender exemption adequately addresses receivership situations. Attendees discussed. Darsi Foss stated that DNR has expected businesses in receivership to continue cleanup. Discussion regarding whether receivers know what is required.

The attendees discussed the number of foreclosures for which lenders had pursued the state exemption versus the amount for which lenders had solely followed ASTM standards, concluding that a low portion of lenders had pursued the state exemption. Mark Timke stated that many lenders are not taking advantage of the exemption. Attendees discussed lenders’ perspectives on dealing with liability, stating that lenders tend to focus on overall risk evaluation for each loan.

Mark Timke asked what extent a lender would need to be involved in a property sale before the lender is deemed to have “possession or control” under the law. Darsi Foss explained two examples where lenders had exercised possession and control over real property.

Darsi Foss mentioned some differences between the ASTM standards for Phase I environmental assessments and the Wis. Stat. 292.21 environmental assessment standards. There was discussion regarding the timing of a lender’s ownership status with regard to foreclosures on real property. Darsi Foss stated that the Subgroup could look at the differences between the acquisition and personal property exemptions with regard to the operation of a business at the property. The group discussed the two relevant subsections.

Mark Timke stated that, aside from the points already discussed, the law was pretty straightforward up to section “i”. The environmental assessment requirements begin at Wis. Stat. § 292.21(1)(c)(2) and had been the subject of previous discussions; do these requirements need to change? Darsi Foss stated lenders and consultants following ASTM Phase I standards did not automatically meet the statutory requirements for the lenders’ environmental assessment. Attendees discussed the process through which banks contracted with consultants and how the additional step of including Wis. Stat. Ch. 292.21 requirements could be missed, especially where lenders are not aware of the differences. To fulfill the Wis. Stat. 80-year title requirement, consultants contracted with title companies, which increased costs and affected timelines, causing clients to decline pursuit of the extra steps. The benefit of the title search; however, was that it allowed DNR to discover other potentially responsible parties, apportioning responsibility further.

Darsi Foss mentioned that the 80-year title search did not frequently cause issues in the requests that have been sent to DNR. Failure to sample under Wis. Stat. §§ 292.21(1)(c)(2)(h) and (i); however, had been a frequent issue.

Mark Thimke stated that the essential question was whether any particular requirement stood in the way of the main policy goal of enabling lending for these properties, with the understanding that all of the statutory steps are necessary to obtain the exemption. Attendees discussed how smaller banks may lack awareness of the exemption's required steps and the differences from ASTM standards. Attendees mentioned that the lender perspective was to look at the overall value of the real estate.

Jennifer Buzacky introduced David Ruetz, stating that she had asked him to discuss the differences between ASTM standards for Phase I environmental assessments and the Wis. Stat. 292.21 environmental assessment standards. Mr. Ruetz first provided historical background on ASTM, then provided an overview of differences, discussing four main areas of difference: site reconnaissance, records review, interviews, and on-site sampling and analysis. Attendees and Mr. Ruetz discussed further dissimilarities: qualification requirements for contractors performing Phase 1 assessments versus Wis. Stat. Ch. 292.21 assessments; costs of an average Phase 1 versus additional Wis. Stat. Ch. 292.21 costs. Jennifer Buzacky raised a concern about the timing and availability of information about DNR "permits" and "records review."

Attendees discussed lending for large farm properties and whether the lending exemptions adequately covered those lenders. They also discussed the various information systems available for discovering environmental contamination information on real properties. They also discussed the variations in how the different laws and standards addressed vapor intrusion and groundwater testing. Mark Thimke asked whether recent legislative changes regarding sediments and the high water mark played into the exemption's effectiveness. Attendees discussed the differences in policy goals behind several laws. Darsi Foss mentioned that there were several requirements that lenders would want to be aware of outside of the exemption, including federal underground storage tank requirements.

Mark Thimke stated that the Subgroup was continuously seeking input on items to be brought to the BSG, as well ideas on the next steps for the Subgroup. Darsi Foss added that DNR would be interested in seeing any items related to outreach or training that might assist the goals of the group. Attendees briefly discussed the non-transferability of the lender exemption and how it may be detrimental to purchasers in bank acquisitions. Jennifer Buzacky encouraged the further submission of timing issues, feasibility concerns, etc., and stated that she would put together a table to track these concerns. These concerns could be sent to either her or Molly Schmidt at DNR. The next meeting date of the Subgroup would be scheduled and announced by email.